STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

ALBERTA STUDIER, PATRICIA M. SANOCKI, MARY A. NICHOLS, LAVIVA M. CABAY, MARY L. WOODRING, and MILDRED E. WEDELL,

Plaintiffs-Appellants/Appellees,

v

MICHIGAN PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD, MICHIGAN PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM, DEPARTMENT OF MANAGEMENT AND BUDGET, and TREASURER OF MICHIGAN,

Defendants-Appellees/Appellants.
_____/

Supreme Court Docket Nos. 125765, 125766

Court of Appeals Docket No. 243796

Ingham Co. Cir. Ct. Docket No. 00-092435-AZ

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BRIEF ON APPEAL OF *AMICI CURIAE* MICHIGAN ASSOCIATION OF SCHOOL BOARDS, MICHIGAN SCHOOL BUSINESS OFFICIALS, AND MICHIGAN ASSOCIATION OF SCHOOL ADMINISTRATORS

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Defendants say:	"Yes."
Amici Curiae say:	"Yes."
The Court of Appeals ruled:	Defendants' actions were proper under Contract Clause analysis.
Plaintiffs say:	"No."

II. WHETHER, ALTERNATIVELY, THE ASSERTED CONTRACTUAL IMPAIRMENT IS BOTH INSUBSTANTIAL AND REASONABLY AND NECESSARILY RELATED TO IMPORTANT STATE INTERESTS?

Defendants say:	"Yes."
Amici Curiae say:	"Yes."
The Court of Appeals says:	"Yes."
Plaintiffs say:	"No."

III. WHETHER SCHOOL RETIREE HEALTH INSURANCE FALLS OUTSIDE THE SCOPE OF THE "FINANCIAL BENEFITS" SUBJECT TO THE MICHIGAN CONSTITUTION'S PREFUNDING REQUIREMENT?

Defendants say:	"Yes."
Amici Curiae say:	"Yes."
The Court of Appeals says:	"Yes."
Plaintiffs say:	"No."

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to MCL 600.215(3) and MCR 7.301(A)(2), along with this Court's September 16, 2004 Orders granting leave to appeal the identified issues. This brief is submitted concurrently with the motion filed under MCR 7.306(D), in which the Michigan Association of School Boards ("MASB"), Michigan School Business Officials ("MSBO"), and the Michigan Association of School Administrators ("MASA") (collectively, the "Associations") seek leave to file a brief as *amici curiae*.

COUNTERSTATEMENT OF FACTS

The Michigan Association of School Boards ("MASB") is a voluntary, nonprofit association of local and intermediate boards of education throughout the State of Michigan, joined together to provide quality educational leadership services for all Michigan boards of education, and advocating the interests of public education. Its membership consists of the boards of education of over 600 local school boards and intermediate school boards in this state.

The Michigan Association of School Administrators ("MASA") is a voluntary, nonprofit corporation existing to advance educational development and opportunities in Michigan by representing the interests of school district superintendents and their first line assistants. MASA is a leading influence on decisions impacting education in the state with representation at meetings of the State Board of Education and standing committees of the Department of Education, as well as regular contact with Department of Education staff regarding important educational decisions affecting Michigan schools.

The Michigan School Business Officials ("MSBO") is a voluntary, nonprofit corporation designed to serve the educational community by continually improving the leadership and management of school business and operational services. MSBO provides its members with information and advice on important educational issues, and is represented on a wide variety of oversight and advisory committees, including a committee pertaining to the Michigan Public School Employees' Retirement System.

Members of the Associations have a significant interest in all financial issues related to their school district members' and employers' required contributions under the Michigan

Public School Employees Retirement Act of 1979, MCL 38.1301, *et seq.* Such interest is particularly acute where, as in this case, the parties initiating the original action (collectively, the "Plaintiffs" or the "Retirees") advocate a position allowing unlimited increases in health insurance costs to become the unmitigable responsibility of various government agencies, including local and intermediate school districts.

Based upon the terms of Section 41 of the Michigan Public Schools Retirement Act, MCL 38.1341, which set forth the payroll contribution rate for financing benefits assessed to public school employers, the aggregate effect of the outcome of this case to Michigan public school districts easily will be measurable in millions of dollars. Each dollar spent upon retiree benefits is, of course, a dollar which is diverted from the schools' primary mission of educating their students.

In their *amici curiae* capacity, the Associations submit this brief in support of Defendants' argument that the State of Michigan and its agencies have the authority and ability to determine the contracted health insurance benefits available to retired public school employees under Section 91 of the Michigan Public School Employees Retirement Act, MCL 38.1391. Except as stated above, the *amici* rely upon the factual statements set forth by the Michigan Public School Employees' Retirement Board, Michigan Public School Employees' Retirement System, the Department of Management and Budget, and the Treasurer of the State of Michigan, designated as Appellees in Docket No. 125765 and Appellants in Docket No. 125766 (collectively, the "Defendants").

ARGUMENT

I. DEFENDANTS MAY INCREASE SCHOOL RETIREES' HEALTH CARE PLAN DEDUCTIBLES AND COPAYMENTS ABSENT SCRUTINY UNDER THE MICHIGAN OR FEDERAL CONSTITUTIONS' CONTRACT CLAUSES AS NO UNMISTAKABLE CONTRACTUAL INTEREST IN THIS INSURANCE COVERAGE EXISTS.

A. STANDARD OF REVIEW

This Court reviews *de novo* both questions of statutory interpretation and constitutional issues. *Havey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003), *Niles Twp v Berrien Co Bd of Comm'rs*, 261 Mich App 308, 312; 683 NW2d 148 (2004). Questions of statutory construction are also reviewed on a *de novo* basis. *Mayor of the City of Lansing v Michigan Pub Service Comm'n*, 470 Mich 154, 157; 680 NW2d 840 (2004).

B. APPLICATION OF STANDARD

Statutory public school retiree health benefits are not bestowed contractual status by the Legislature. No federal or state constitutional protection against the Defendants' enactment of minimal increases to health insurance copayments and deductibles therefore exists.

The United States Constitution's Contract Clause states in relevant part that:

> No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the obligation of contracts . . ..

US Const, art I, § 10. The Michigan Constitution has a virtually identical Contract Clause, which states:

> No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted.

Const 1963, art 1, § 10. Given the Michigan Contract Clause's substantial identity with its federal counterpart, it is not interpreted more expansively. *In re Certified Question*, 447 Mich

765, 776, 77 n 13; 527 NW2d 468 (1994), *cert den* 514 US 1127; 115 S Ct 2000; 131 L Ed 2d 1001 (1995), *Attorney General v Michigan Pub Service Comm'n*, 249 Mich App 424, 434; 642 NW2d 691, *lv den* 467 Mich 930 (2002).

Under the Contract Clause, statutes are rebuttably presumed *not* to create contractual rights protected from impairment. The presumption is that "a law is not intended to create private contractual or a vested rights, but merely declares a policy to be pursued until the legislature shall ordain otherwise." *National Railroad Passenger Corp v Atchison, Topeka & Santa Fe Rwy Co, et al*, 470 US 451, 466; 105 S Ct 1441; 84 L Ed 2d 432 (1985), quoting *Dodge v Board of Educ*, 302 US 74, 79; 58 S Ct 98; 82 L Ed 57 (1937). The United States Supreme Court explained:

> This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. *Indiana ex rel Anderson v Brand*, 303 US 95, 104-105 (1938). ***Policies, unlike contracts, are inherently subject to revision and/or appeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body.*** Indeed, "'[the] continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation.'" *Keefe v Clark*, 322 US 393, 397 (1944) (quoting *Charles River Bridge v Warren Bridge*, 11 Pet 420, 548 (1837)). Thus, the party asserting the creation of a contract must overcome this well-founded presumption. *Dodge*, *supra*, at 79, and we proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation.

Id. (Emphasis added).

In determining whether a particular statute gives rise to a contractual obligation, it is of primary importance to examine the relevant language. *Id.* This is the starting point of all judicial analysis of whether a statute burdens the state or private parties with contractual obligations.

Courts do not lightly impose the implied surrender of legislative powers inherent in any statutory scheme having contractual effect. Indeed, the courts require that legislative intent to create statutory contractual rights be expressed in an unmistakably clear manner. See *United States v Winstar Corp*, 518 US 839, 872; 116 S Ct 2432; 135 L Ed 2d 964 (1976), *Rhode Island Bhd of Correctional Officers v State of Rhode Island*, 357 F3d 42, 45 (CA 1, 2004), *Parker v Wakelin*, 123 F3d 1 (CA 1, 1997), *cert den* 523 US 1106; 118 S Ct 1675; 140 L Ed 2d 118 (1998). In *Parker*, the United States Court of Appeals for the First Circuit explained this "unmistakability doctrine" as follows:

> Because legislatures should not bind future legislatures from employing their sovereign powers in the absence of the clearest of intent to create vested rights protected under the Contract Clause, courts developed canons of construction disfavoring implied governmental contractual obligations. Thus, "'neither the right of taxation, nor any other power of sovereignty, will be held . . . to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken.'" *Winstar*, 116 S. Ct. at 2455 (quoting *Jefferson Branch Bank v Skelly*, 66 U.S. (1 Black, 436, 446, 17 L. Ed. 173 (1862)). The requirement that "the government's obligation unmistakenly appear thus served the dual purposes of limiting contractual incursions on a State's sovereign powers and of avoiding difficult constitutional questions about the extent of State authority to limit the subsequent exercise of legislative power." *Winstar*, 116 S. Ct. at 2455.

123 F3d at 5. Courts should therefore "suspend judgment" and "proceed cautiously" before concluding that any statutory scheme confers public contract rights. *Id.* at 8.

This judicial skepticism is particularly acute where public employee pay and benefits are at issue. Even where public employee retirement rights are at issue, courts have generally construed underlying state statutes as policies subject to change, rather than as legislatively-granted contractual rights. See, *e.g.*, *Parker*, *supra*, *Pineman v Fallon*, 662 F Supp 1311, 1316 (D Conn, 1987). This is due primarily to the ease with which the requisite legislative intent to create a statutory "contract" may be expressed.

In *Rhode Island Bhd of Correctional Officers*, *supra*, a case involving a Rhode Island incentive pay statute for certain public employees, the court explained the ease with which legislative bodies may attach contract rights to statutes under applicable legal standards:

> *It would have been child's play for the Rhode Island legislature to say explicitly in 1976 that educational credits once earned created private rights or that incentive pay could never be differently calculated for existing employees who had qualified for incentive pay.* True, civil service jobs commonly create expectations that holders will likely enjoy no reductions in pay (but instead get periodic increases); but expectations alone are not contracts – contracts are written to protect expectations. Indeed, legislation constantly creates expectations that are disappointed by later modifications, repeal or lack of funding.

357 F2d at 46 (emphasis added).

The "unmistakability doctrine" was recently applied in a case where vested individuals were removed from participation in a state operated public school employees' pension plan. *National Educ Ass'n–Rhode Island v Retirement Bd of the Rhode Island Employees' Retirement System*, 172 F3d 22 (CA 1), *cert den* 528 US 929; 120 S Ct 326; 145 L Ed 2d 254

(1999). That matter concerned Rhode Island's public school employee retirement system which, like Michigan's, provides employees with a defined benefit pension plan. *Id.* at 24.

In 1987, the Rhode Island legislature passed a statute allowing teachers' union employees to join the retirement system, and to be permitted to purchase retirement credit for all their years of union service. *Id.* at 24. Pensions were to be based upon the employees' union salary, over which the state had no control. *Id.*

This resulted in a financial windfall to retiring union employees. For example, a union employee purchased 25 years of service credit for $25,411.09. Several months later, at age 52, he took an early retirement funded by state pension benefits of approximately $53,000 per year. *Id.* at 25.

The significant financial gains these private employees enjoyed at state expense resulted in further legislative action. In 1994, another statute was passed "evicting" the union employees from pension plan participation. The statute, however, provided for return of the employees' contributions with interest, reduced by any benefits received. *Id.*

The First Circuit rejected the union employees' Contract Clause claims, concluding that the Rhode Island school retirement statute did not "clearly and unequivocally" provide them a contractual right to future pension benefits. *Id.* at 28. The court supported this holding by reasoning:

> Some courts, including this one, have been quite hesitant to infer a contract where the state pension statute neither speaks in the language of contract nor explicitly precludes amendment of the plan. After all, legislatures regularly modify compensation schedules and benefit programs. Supreme Court precedent has tended to treat government pension statutes as similarly subject to modification for payments not yet made

> unless the government's intent to create a contract is clear and definite.

Id. at 26.

In the present case, public school retirees enjoy no public contractual right to health insurance benefits, much less a right to receive such a benefit without being assessed deductibles or prescription copayments. Such intent is not expressed through § 91 of the Public School Employees Retirement Act, MCL 38.1391, which is devoid of any expression of legislative intent to render that entitlement a contractual right. The Michigan Legislature never intended to diminish the power of future legislatures from amending MCL 38.1391, and to thereby burden Michigan school districts with unmitigated, steadily increasing retiree health care costs in perpetuity. That issue will be explored in greater detail in the following section of this Brief.

1. The Michigan Legislature Did Not Intend to Grant Public School Retirees a Contractual Right to Health Insurance.

Section 91 of the Michigan Public School Employees Retirement Act reveals no clear or unmistakable legislative intent to bestow contractual status to public school retirees' health benefits. MCL 38.1391(1) states only that:

> The retirement system shall pay the entire monthly premium or membership or subscription fee for hospital, medical-surgical, and sick leave benefits for the benefit of a retirant or retirement allowance beneficiary who elects coverage in the plan authorized by the retirement board and the department.

When the Michigan Court of Appeals analyzed the above language in this case, it revealed its awareness of the "unmistakability doctrine" as discussed in the preceding section of this Brief. *Studier v Michigan Pub Sch Employees' Retirement Bd*, 260 Mich App 460, 475-

76; 679 NW2d 88 (2004). Having done so, however, the court erroneously concluded without analysis that the mere provision of the benefit implied a legislative intent to grant public school retirees a contractual right therein. *Id.* at 475-76.

In so doing, the Court of Appeals ignored all the classic expressions of legislative intent to confer public contractual rights by statute. Initially, MCL 38.1391 does not contain any provision in which the State of Michigan "covenants and agrees with anyone to do anything." *National RR Passenger Corp, supra*, 470 US at 449.[1] Moreover, the Court of Appeals never acknowledged or noted the significance of the indisputable fact that the statute "does not say that the provisions are a contractual commitment by the State or will never be changed, nor is there language authorizing the State to enter into contracts guaranteeing such benefits forever." *Rhode Island Bhd of Correctional Officers, supra*, 357 F3d at 46. See also *In re Certified Question, supra*, 447 Mich at 777-78. Indeed, MCL 38.1391 has been amended nine times since its enactment in 1980.

Finally, and most importantly, the Court of Appeals failed to apply the presumption against creation of statutory contractual rights, and in favor of construing statutes only as expressing legislative policy, regardless of whether an entitlement is provided. See *National RR Passenger Corp, supra*, 470 US at 466. In failing to apply this presumption in the utter absence of statutory language creating contractual rights, the court converted a current expression of legislative policy into a perpetually binding right. The court thus took the

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[1] *C.f. Indiana ex rel Anderson v Brand*, 303 US 95, 105; 58 S Ct 443; 82 L Ed 685 (1938) (contract status legislatively bestowed where state statute that has a title "couched in terms of contract"; that "speaks of making and cancelling of indefinite contracts"; and that uses language which expressly defines a "contractual relationship" between teachers and school districts).

extraordinary, unprecedented step of recognizing a public contract right by subtle implication, rather than by "clear and unmistakable" legislative pronouncement. In so doing, the court has both diminished the power of future legislatures to amend Michigan public policy in this regard, and has burdened the state and its public school districts with a perpetual health care cost burden for public school employees which, at best, must be subjected to constitutional scrutiny before being amended. The Court of Appeals' conclusion in that regard is in direct contravention to well established Contract Clause jurisprudence, and should be reversed.

II. ALTERNATIVELY, THE ASSERTED CONTRACTUAL IMPAIRMENT IS BOTH INSUBSTANTIAL AND REASONABLY AND NECESSARILY RELATED TO IMPORTANT STATE INTERESTS.

A. STANDARD OF REVIEW

The Associations incorporate by reference the *de novo* standard of review articulated in Section I(A) of this Argument.

B. APPLICATION OF STANDARD

Even assuming for argument's sake that MCL 38.1391 extends to Plaintiffs a contractual right to health insurance benefits, the alleged impairment thereto is both insignificant and, alternatively, reasonably related to an important governmental interest. Contract Clause analysis requires three inquiries: (1) whether there is a contractual relationship; (2) whether a change in law has impaired that relationship; and (3) whether the impairment is substantial. *General Motors Corp v Romein*, 503 US 181, 186; 112 S Ct 1105; 117 L Ed 2d 328 (1992).

If a substantial impairment of a constitutionally protected contractual relationship has occurred, the reviewing court must then determine whether the impairing law has a legitimate

and important purpose, and whether the adjustment of the contracting parties' rights was reasonable and appropriate in light of that purpose. See *Allied Structural Steel Co v Spannaus*, 483 US 234, 242-44; 98 S Ct 2716; 57 L Ed 2d 727 (1978). Accordingly, not every impairment by a state of its own apparent contractual obligations is prohibited by the Contract Clause. *United States Trust Co v New Jersey*, 431 US 1, 21; 97 S Ct 1505; 52 L Ed 2d 92 (1977).

In this matter, no "substantial" impairment to the asserted contract resulted from the minimal increases in copays and deductibles. Moreover, any "contractual impairment" was reasonable and necessary to serve a legitimate or important public purpose. Those two issues will be analyzed in the following subsections of this Brief.

1. The Minimal Increase in Insurance Copayments and Deductibles Is Not a "Substantial Impairment" of the Alleged Contract.

Assuming for argument's sake that the requisite contract exists, the small increase in insurance copayments and deductibles is not a matter of constitutional magnitude. In *Maryland State Teachers Ass'n, Inc v Hughes*, 594 F Supp 1353 (D Md, 1984), a case upholding a statutory cap upon previously unlimited cost of living adjustments for public school teacher pensions, the court explained that:

> The legitimate expectations of the contracting parties must be examined to determine whether the impairment complained of is "substantial" as well as to determine its level of severity. *United States Trust Co*, 431 U.S. at 19-20 n 17; *Spannaus*, 438 U.S. at 245-46; *Energy Reserves Group* [*v Kansas Power & Light*, 499 U.S. 400, 411, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983)].

594 F Supp at 1359.

In the present case, Plaintiffs challenge a twenty dollar ($20.00) health insurance deductible increase for each individual, and forty dollar ($40.00) deductible increase for each family. *Studier v Michigan Pub Sch Employees' Retirement Bd, supra*, 260 Mich App at 467. They further challenge a 20 percent prescription drug copayment, ranging from a four dollar ($4.00) minimum to a twenty dollar ($20.00) maximum for a one month supply, and a fifty dollar ($50.00) maximum for a three month supply received by mail. *Id.* at 466.

Based upon the terms of the asserted statutory "contract" set forth by MCL 38.1391, Plaintiffs cannot be deemed to have a legitimate expectation either of freedom from deductibles or prescription copayments, or from increases of those charges. As the Court of Appeals noted:

> The statute does not provide . . . for a particular health care plan, and, in fact, does not provide for a prescription drug coverage. To the contrary, the language of the statute contemplates that the board may change the health care plan. The board has not lessened the coverage available under the health care plan but, rather, has added coverage for new procedures, new services, and new prescription drugs.

Studier, supra, 260 Mich App at 477, n 10.

The Court of Appeals further explained that no substantial change in the health benefit had occurred, when viewed over the history of that entitlement's provision to public school retirees:

> Deductibles and copayments have historically been a component of the MPSERS health care plan. The challenged action of defendants does not directly affect the terms of the contract. The board continues to pay the entire monthly premium for health benefits for retirees as provided in subsection 99(1) and the payment of a particular premium, *i.e.*, the "full cost" of the premium, is what is provided by statute.

> The alleged impairment does not alter this basic benefit to the retiree and is therefore not substantial.

Id. at 476-77.

Based upon the foregoing facts, Plaintiffs have only a subjective expectancy that they would not be required to pay slightly increased prescription copayments or deductibles. This, in and of itself, defeats any assertion that a "substantial" impairment of contract has occurred. Moreover, the *de minimis* nature of the increase in deductibles and copayments cannot, as the Court of Appeals ruled, be found to alter the basic insurance benefit that the retirees receive. No unconstitutional impairment of the alleged contract has therefore occurred.

2. Small Increases in Insurance Copayments and Deductibles Are Reasonable and Necessary Cost Control Measures.

Assuming, *arguendo*, that a substantial contract impairment has occurred, the minimal increases in retiree deductibles and copayments are constitutional as a reasonable and necessary cost control measure. In *Maryland State Teachers Ass'n, supra*, the court explained the level of judicial deference to be applied to legislative impairments of state contracts, as announced by the United States Supreme Court in *United States Trust Co, supra*. The court stated:

> [A] reviewing court must decide . . . whether the challenged legislation is reasonable and necessary to serve a legitimate or important public purpose. It is at this level of analysis that a more strict review is necessary to be applied to contracts of a state than to solely private contracts since the state's self-interest might cause its legislature to make legislative findings and judgments which are not objective but prejudiced in favor of the state. *United States Trust Co*, 431 US at 26. Nevertheless, this is not to say that the legislative history and findings are to be ignored or that the court is to sit as a super legislature, making its own totally independent assessment of

> reasonableness and necessity. As the Court in *United States Trust Co* said, 431 US at 26, it is only "*complete* deference" (emphasis supplied) to the legislative findings which is to be avoided. And, in both public as well as private contract cases, the level of court scrutiny will vary directly with the extent of the contractual impairment imposed by the challenged legislation. *Energy Reserves Group*, 459 US, at 411.

594 F Supp at 1361.

Although the court in *Maryland State Teachers Ass'n* did not find the cost of living adjustment cap to be a "substantial" impairment to the contract at issue, it nevertheless went on to analyze in the alternative whether that statutory cap was "reasonable and necessary." In so doing, the court engaged in an intensive factual analysis regarding the necessity for limiting pension payment increases to maintain the fiscal stability of the state teachers' pension system.

The court ultimately concluded that, even assuming the truth of the teachers' union's claim that the pension system was economically viable, the financial caps imposed still survived constitutional scrutiny. Finding that a financial disaster was not a prerequisite to legislative action, the court stated:

> Accepting the conclusion of actuarial soundness of the systems as true, this court observes the neither *Baker v Baltimore*, *supra*, nor *City of Frederick v Quinn*, *supra*, requires as a matter of State law that the legislature wait until a pension system is actuarially unsound before making changes in that system. Certainly, there is no such federal constitutional requirement. Such a requirement would jeopardize the pension benefits of current and future retirees, would require that the trustees of the Retirement Systems abdicate their role as fiduciaries, and would impose an irrational limitation on the legislature's police power. A pension system need not be actuarially unsound before a legislature may move to change the system and the benefits it provides its members.

594 F Supp at 1368.

In the present case, Defendant Retirement Board ordered minimal increases to health insurance deductibles and copayments for the obvious purpose of reducing aggregate costs to the system while placing minimal burdens upon retirees. This minimal burden, combined with the very substantial deference provided state actors under this circumstance, requires a finding that any asserted "substantial impairment" to the alleged statutory contract meets the constitutional "reasonable and necessary" standard. Should the Court reach this point in the constitutional analysis, the increase in deductibles and copays should be found to be a proper, constitutional exercise of legislatively granted powers.

III. SCHOOL RETIREE HEALTH INSURANCE FALLS OUTSIDE THE SCOPE OF THE "FINANCIAL BENEFITS" SUBJECT TO THE MICHIGAN CONSTITUTION'S PREFUNDING REQUIREMENT.

A. STANDARD OF REVIEW

The Associations incorporate by reference the *de novo* review standard articulated in section I(A) of the Argument.

B. APPLICATION OF STANDARD

The Michigan Court of Appeals correctly concluded that school retiree health insurance benefits are not "financial benefits" subject to the prefunding requirements of the Michigan Constitution. The Court of Appeals' ruling should therefore be affirmed in that regard. *Studier, supra*, 260 Mich App at 473.

Article 9, § 24 of the Michigan Constitution states:

> The *accrued financial benefits* of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.

> *Financial benefits arising on account of service rendered in each fiscal year* shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

Const 1963, art 9, § 24 (emphasis added).

The references to "financial benefits" in Article 9, § 24 are secondary to, and thus limit, the statements that public pension or retirement system membership gives rise to funding or contract protections. Under the plain terms of this constitutional provision, the prefunding requirement therefore applies *only* to *certain specific benefits* extended by the public pension plan, rather than to all items of value provided to public school retirees.

The Michigan Court of Appeals correctly ruled that the "financial benefits" referenced could not include retiree health insurance for two reasons: (1) "financial" is intended to reference actual money, and not the contingent third party payments provided by insurance contracts; and (2) health insurance benefits could not have been within the framers' intent, because they neither existed at the time of the 1961 Michigan Constitutional Convention, nor were they expressly included within the definition of "accrued financial benefits." *Studier*, *supra*, 260 Mich App at 473.

The Michigan courts and Attorney General have previously reached an identical conclusion. This Court has defined the term "accrued financial benefits" as it appears in Const 1963, art 9, § 24 as "the right to receive certain pension payments upon retirement, based upon service performed." *Kosa v State Treasurer*, 408 Mich 356, 370-71; 292 NW2d 452 (1980). That definition has been closely followed in subsequent Michigan judicial and Attorney General opinions. See, *e.g.*, *Shelby Twp Police and Fire Retirement Bd v Charter Twp of*

Shelby, 438 Mich 247, 254 n 3; 475 NW2d 249 (1991), *Association of Professional and Technical Employees v City of Detroit*, 154 Mich App 440, 445-46; 398 NW2d 436 (1986), *Halstead v City of Flint*, 127 Mich App 148, 154; 338 NW2d 903 (1983) 1989 OAG No. 6583 (June 1, 1989).

The restrictive case law definition of "accrued financial benefits" is directly supported, and further explained, by statements of the framers of the 1963 Michigan Constitution. In *Kosa, supra*, the Court quoted a colloquy between several delegates to the 1961 Constitutional Convention. With respect to this issue, the following statement of Delegate VanDusen is particularly instructive:

> [I] would like to indicate that the words "accrued financial benefits" were used *designedly*, so that the contractual right of the employee would be *limited to the deferred compensation embodied in any pension plan*, and that we hope to avoid thereby a proliferation of litigation by individual participants in retirement systems talking about the general benefit structure, or something other than his specific right to receive benefits.

Kosa, supra, 408 Mich at 459, n 21, quoting *1 Official Record, Constitutional Convention 1961*, pp 773-74. (Emphasis added).

Plainly, the provision of health insurance to retirees cannot be considered "deferred compensation embodied in *any* pension plan." (Emphasis added). Such compensation is, of course, limited to the periodic cash payments received by retired members of defined benefit pension plans, such as that created by the Michigan Public School Employees Retirement Act of 1979.

Moreover, no distinction, other than verb tense, exists between a retiree's "accrued financial benefits," as referenced in the first paragraph of Const 1963, art 9, § 24, and a

retiree's "[f]inancial benefits arising on account of service rendered in each fiscal year," as referenced in the second paragraph of that constitutional provision. To "accrue" is to "accumulate periodically." *Black's Law Dictionary* (7th Ed), p 21 (West, 1999). From the perspective of retirees receiving benefits from the Michigan Public School Employees Retirement System, such as the Plaintiffs in this case, no distinction exists between "accrued financial benefits" and "[f]inancial benefits arising on account of service rendered in each fiscal year," which is succinctly stated by the phrase, "*accruing* benefits." Accordingly, the "Legislature's constitutional contractual obligation" under Article 9, § 24 is solely "not to impair 'accrued financial benefits,' even if that obligation also related to the funding system . . .." *Kosa, supra*, 408 Mich at 373.

The health insurance at issue is not within the class of "financial benefits" referenced in the Michigan Constitution, because it neither "accrues" nor "arises on account of service rendered in *each* fiscal year." Rather, qualified retirants under the Public School Employees Retirement Act may receive retiree health insurance coverage, regardless of the amount of money they earn during employment. MCL 38.1391(1). Moreover, this insurance benefit is not received as a matter of course, but must instead be elected. *Id.* The level of health insurance coverage provided also is fixed, and does not vary with years of service or compensation level achieved. The retiree health insurance benefit conferred by MCL 38.1391 is therefore best described as a contingent benefit which vests equally in every eligible retiree upon the date of retirement, rather than a benefit which has "accrued" is accruing, or is otherwise dependent upon service rendered on a fiscal year basis.

Based upon the foregoing standards and definitions, the contingent health insurance coverage benefit cannot fall within the definition scope of either "accrued financial benefits" or financial benefits "arising on account of service rendered in each fiscal year." Plaintiffs' argument to the contrary would read the constitutional language limiting the word "benefits" out of existence, requiring any benefit with financial value to be equated with either accrued or accruing monetary benefits.

The Court of Appeals therefore correctly ruled that health insurance coverage was neither within the scope of the limited benefits defined in Const 1963, art 9, § 24, nor were they within the Constitution's framers' intent . The Court of Appeals' opinion in that regard should therefore be affirmed.

CONCLUSION

For the reasons stated, the *amici curiae* Associations respectfully request that this Court affirm the Court of Appeals' dismissal of this case. In so doing, however, the Court should hold that MCL 38.1391(1) does not create a contractual obligation, and that the health benefits at issue are not "accrued financial benefits," "financial benefits arising on account of service rendered in each fiscal year," or otherwise simply "financial benefits" within the meaning of Const 1963, art 9, § 24. Should the Court so rule, the challenged health care plan amendments cannot, as a matter of law, impair existing contractual obligations in violation of Const 1963, art 1, § 10 or US Const, art I, § 10.

Respectfully submitted,

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